



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty – This bill defines the term “unborn child” as a “member of the species homo sapiens, at any stage of development, who is carried in the womb,” and revises terminology in various criminal statutes to refer to an “unborn child” rather than an “unborn quick child.”

#### B. EFFECT OF PROPOSED CHANGES:

##### *Federal Law:*

In 2004, the Unborn Victims of Violence Act (UVVA) was enacted. The UVVA amends title 18 of the U.S. Code and the Uniform Code of Military Justice<sup>1</sup> to add new sections for the “protection of unborn children.” Under the act, any person who injures or kills a “child in utero” during the commission of certain specified crimes is guilty of an offense separate from one involving the pregnant woman. Punishment for the separate offense is the same as if the offense had been committed against the pregnant woman. In addition, an offense does not require proof that the person engaging in the misconduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant, or that the defendant intended to cause the death of, or bodily injury to, the child in utero. The phrase “child in utero” is defined by the act to mean “a member of the species homo sapiens, at any stage of development, who is carried in the womb.”

##### *State Law:*

At least twenty-nine states have statutes that criminalize the killing of a fetus or “unborn child.”<sup>2</sup> These statutes vary with respect to the point at which criminal liability will attach; that is, the states identify different gestational stages at which the killing of an embryo or fetus will result in criminal liability.<sup>3</sup> Florida Statutes currently criminalize the killing of an “unborn quick child.” Specifically, s. 782.09, F.S., provides that the unlawful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed murder in the same degree as that which would have been committed against the mother. This section of statute does not authorize the prosecution of any person in connection with a termination of pregnancy pursuant to ch. 390, F.S.<sup>4</sup> Currently, the term “unborn quick child” is defined in accordance with the definition of “viable fetus” set forth in s. 782.071, F.S., which provides that a “fetus is viable when it becomes capable of meaningful life outside the womb through standard medical measures.”

Florida defines vehicular homicide as “the killing of a human being, or the killing of a *viable fetus* by any injury to the mother, caused by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another.”<sup>5</sup> The vehicular homicide statute specifies that a right of action for civil damages exists under s. 768.19, F.S., for all deaths described in the statute.

In order to prove a DUI manslaughter case, the state must establish the following elements:

- The defendant operated a vehicle.
- The defendant, by reason of such operation, caused or contributed to the cause of the death of any human being or unborn *quick child*.<sup>6</sup>

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<sup>1</sup> The Uniform Code of Military Justice is codified in chapter 47 U.S.C. 10.

<sup>2</sup> See “The Unborn Victims of Violence Act” CRS Report for Congress, Jon O. Shimabukuro.

<sup>3</sup> *Id.*

<sup>4</sup> s. 782.09(4), F.S.

<sup>5</sup> s. 782.071, F.S.

<sup>6</sup> The term “unborn quick child” is defined as a “viable fetus” which is defined as a “fetus is viable when it becomes capable of meaningful life outside the womb through standard medical measures.” See s. 782.071, F.S.

- At the time of such operation, the defendant was under the influence of alcoholic beverages or a controlled substance to the extent that the defendant's normal faculties were impaired or the defendant had a blood alcohol level of .08 or higher.<sup>7</sup>

*Effect of the Bill:*

HB 71 amends s. 782.09, F.S., by replacing the term "unborn quick child" with "unborn child." The bill mirrors federal law by defining the term "unborn child" as "a member of the species homo sapiens, at any stage of development, who is carried in the womb." HB 71 also amends this statute to specify that the offense does not require proof that the defendant knew or should have known that the victim of the underlying offense was pregnant, or that the defendant intended to cause the death of, or bodily injury to, the unborn child.

HB 71 amends the vehicular homicide statute by replacing the term "viable fetus" with "unborn child," and specifies that that statute should not be construed to create or expand any civil cause of action for negligence based on statute or common law. The bill amends the DUI manslaughter statutes by replacing the term "unborn quick child" with "unborn child."

HB 71 also amends ss. 435.03 and 435.04, F.S., relating to employment screening standards, and s. 921.0022, F.S., the offense severity ranking chart of the Criminal Punishment Code, to conform terminology.

C. SECTION DIRECTORY:

**Section 1.** Cites the act as the "Florida Unborn Victims of Violence Act."

**Section 2.** Amends s. 782.071, F.S., relating to vehicular homicide.

**Section 3.** Amends s. 782.09, F.S., relating to killing an unborn quick child by injury to the mother.

**Section 4.** Amends s. 316.193, F.S., relating to driving under the influence; penalties.

**Section 5.** Amends s. 435.03, F.S., relating to Level 1 screening standards.

**Section 6.** Amends s. 435.04, F.S., relating to Level 2 screening standards.

**Section 7.** Amends s. 921.0022, F.S., relating to the Criminal Punishment Code; offense severity ranking chart.

**Section 8.** This bill takes effect October 1, 2007.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference has not yet met to consider the prison bed impact of this bill. However, to the extent that this bill allows persons to be prosecuted for the death of a fetus at an earlier stage of development than currently provided by law, there may be an additional prison bed impact.

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<sup>7</sup> s. 316.193, F.S.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

While there is little Florida caselaw on point, an examination of cases from other states reveals that courts have declined to invalidate state fetal homicide statutes. In *State v. Merrill*, the Minnesota Supreme Court concluded that the state's unborn child homicide statutes did not violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and were not unconstitutionally vague.<sup>8</sup> Merrill shot a woman who was pregnant with a twenty-seven or twenty-eight-day-old embryo. With respect to his equal protection claim, Merrill argued that the statutes subjected him to prosecution for ending a pregnancy while allowing a pregnant woman to terminate a nonviable fetus or embryo without criminal consequences.<sup>9</sup> Merrill contended that the statutes treated similarly situated persons differently.

The court rejected Merrill's equal protection claim on the grounds that the defendant and a pregnant woman are not similarly situated: "The defendant who assaults a pregnant woman causing the death of the fetus she is carrying destroys the fetus without the consent of the woman. This is not the same as the woman who elects to have her pregnancy terminated by one legally authorized to perform the act."<sup>10</sup> Unlike the assailant who has no right to kill a fetus, the pregnant woman has a right to decide to terminate her pregnancy. The actions of the woman's doctor are based on the woman's constitutionally protected rights under *Roe v. Wade*.<sup>11</sup>

Merrill advanced two arguments for finding the statutes to be unconstitutionally vague. First, he contended that the statutes failed to give fair warning of the prohibited conduct. Merrill maintained that it was unfair to punish an assailant for the murder of an unborn child when neither he nor the pregnant woman may be aware of the pregnancy. However, the court found

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<sup>8</sup> See "The Unborn Victims of Violence Act" CRS Report for Congress, Jon O. Shimabukuro, *citing* 450 N.W.2d 318 (Minn. 1990).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See "The Unborn Victims of Violence Act" CRS Report for Congress, Jon O. Shimabukuro, *citing* 410 U.S. 113 (1973).

that the statutes provided fair warning based on the doctrine of transferred intent. The court noted that even if the offender did not intend to kill a particular victim, he should have fair warning that he would be held criminally accountable given that the same type of harm would result if another victim was killed.

Merrill's second argument was that the statutes encouraged arbitrary and discriminatory enforcement by using the phrase "cause the death of an unborn child"<sup>12</sup> to identify prohibited conduct without actually defining when death may occur. Merrill believed that the failure to identify when death occurs for the unborn child would result in judges and juries providing their own definitions. Moreover, Merrill asserted that because an embryo is not alive, it could not experience death.

The court determined that to have life means "to have the property of all living things to grow, to become." The court avoided the question of whether the unborn child should be considered a person or human being. Instead, the court observed that criminal liability "requires only that the embryo be a living organism that is growing into a human being. Death occurs when the embryo is no longer living, when it ceases to have the properties of life." Thus, the trier of fact would simply have to determine whether an assailant's acts caused the embryo or unborn child to stop growing or stop showing the properties of life.

In *People v. Ford*, the Appellate Court of Illinois concluded similarly that the state's fetal homicide statute did not violate the Equal Protection Clause of the Fourteenth Amendment and was not unconstitutionally vague.<sup>13</sup> Like Merrill, Ford argued that the statute treated similarly situated people differently. While a pregnant woman could terminate her nonviable fetus without punishment, an assailant would face criminal penalties for killing such a fetus. Following the Minnesota Supreme Court, the Illinois court found that the defendant and a pregnant woman are not similarly situated.<sup>14</sup> In addition, the court determined that the statute could be upheld as rationally related to a legitimate governmental purpose. Because the statute did not affect a fundamental right held by the defendant, and because it did not discriminate against a suspect class, the validity of the statute could be considered under the rational basis standard of review. The court concluded that the statute was rationally related to a legitimate governmental interest in protecting the potentiality of human life.<sup>15</sup>

Ford's vagueness argument focused on the statute's use of the phrase "cause the death of an unborn child."<sup>16</sup> Ford contended that the absence of statutory definitions for when life begins and death occurs would result in the application of subjective definitions by the trier of fact, and lead to the arbitrary and discriminatory enforcement of the statute.<sup>17</sup> Citing *Merrill*, the court maintained that the trier of fact would be required only to determine whether there was an embryo or fetus that was growing into a human being, and whether because of the acts of an assailant, that growing was stopped. The statute did not require the trier of fact to apply its subjective views.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

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<sup>12</sup> Minnesota statute 609.266, defines "unborn child" as "the unborn offspring of a human being conceived, but not yet born."

<sup>13</sup> See "The Unborn Victims of Violence Act" CRS Report for Congress, Jon O. Shimabukuro, *citing* 581 N.E.2d 1189 (Ill.1991).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Illinois defines "unborn child" as "any individual of the human species from fertilization until birth." Ch. 38 12-3.1.

<sup>17</sup> See "The Unborn Victims of Violence Act" CRS Report for Congress, Jon O. Shimabukuro, *citing* 581 N.E.2d 1189 (Ill.1991).

#### D. STATEMENT OF THE SPONSOR

No statement submitted by the original bill sponsor.

The chair of the Safety & Security Council chose not to submit any further comments regarding the council substitute.

#### IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 7, 2007, the Homeland Security & Public Safety Committee adopted one amendment and reported the bill favorably as amended. The amendment provides legislative intent language regarding civil liability.

On March 21, 2007, the Safety & Security Council reported the bill favorably with a council substitute. This analysis is drafted to the council substitute.